No. 12222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED, a corporation,

Appellant,

vs.

LESTER COLE,

Appellee.

APPELLANT'S CLOSING BRIEF.

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Preliminary Statement.

In this closing brief it will be assumed that the court has in mind the theory of the case and the attack upon the judgment developed by appellant in the Opening Brief.[1] In replying to Plaintiff's Brief a mere reference to the Opening Brief will be made when it is thought that plaintiff's argument on any point has been fully covered therein.

It is believed that plaintiff does not attempt to answer many of defendant's arguments and that in a number of instances where plaintiff purports to answer an argument, the answer is in effect merely a statement that what defendant says is not so. The limitation of length imposed by the rules is such that defendant cannot catalogue these situations and must assume that they will be evident to the court.

There are instances in which plaintiff's statements of defendant's position does not accord with that position as

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[1] "O. B." will refer to Appellant's Opening Brief, and "P. B." to Appellee's Brief. The parties will be referred to by their designations in the trial court.

expressed in the Opening Brief and there are some instances where it is believed that statements in Plaintiff's Brief are not supported by the record. This brief will contain some comment in this regard by way of illustration, but here again, because of the limitation of space, defendant will rely largely upon the fact that in its Opening Brief defendant has defined its position, and has presented a statement of the case to which plaintiff takes no exception.

Comment Upon Plaintiff's "Statement of the Case" and "The Facts."

In this comment defendant will follow plaintiff's numbered paragraphs.

1. See Opening Brief as a whole.

2. The circumstances leading up to the Notice of Suspension (insofar as defendant was permitted to show them) are set forth in defendant's "Statement of Fact" (O. B. pp. 10-34), without, we believe, characterization, coloring or argument.

The injury which defendant's reputation suffered through plaintiff's actions did not have to be measured in money and injury to its reputation was implicit in the public reaction which defendant should have been permitted to prove or concerning which the court should have instructed as a matter of judicial knowledge. In fact injury from an employee's breach of his employment contract is not a necessary condition to exercise of the employer's rights. (*Bank of America v. Republic Productions,* 44 Cal. App. 2d 651, 654, 112 P. 2d 972, 974; *May v. New York M. Pic. Corp.,* 45 Cal. App. 396, 404, 18 Pac. 785, 788; *Jerome v. Queen City Cycle Co.,* 163 N. Y. 351, 57 N. E. 485, 487; *Farmer v. First Tr. Co.* (C. C. A. 7), 236 Fed. 671, 673; *Von Heyne v. Tompkins,* 8

Minn. 77, 93 N. W. 901, 903-4; *Brown v. Dupuy* (C. C. A. 7), 4 F. 2d 367, 369.)

The defendant has never argued plaintiff's right as an individual to refuse, and take the consequences of refusal, to answer the questions asked by the Congressional Committee, but contends that since his refusal brought the foreseeable public reaction claimed by defendant, it constituted a breach of contract.

3. See our preceding "2."

4. See Opening Brief as a whole.

The statement (P. B. 4 & 5) that defendant was informed that at a private hearing by the Committee plaintiff was charged with being a Communist, is not supported by the citation.

In Opening Brief pages 31-32, 88-90, there is a complete refutation of plaintiff's statement (P. B. p. 15) that prior to testifying plaintiff had no intimation that his employment might be jeopardized by his conduct in connection with the Committee hearings.

Beginning at page 15 and through page 18 of his brief plaintiff discusses the evidence relative to matters transpiring after these hearings. These matters are dealt with fully in the Opening Brief at pages 21-23, 27-31, 81-83.

"The Pleadings."

In his reference to the pleadings, plaintiff fails to note that one of the issues arose from plaintiff's allegation that defendant did not have the right to suspend plaintiff's employment *or compensation* for any reason or ground *whatever* [R. 4-5]—an issue which warranted due consideration of defendant's contention that it did not have to confine justification of its actions to the reasons assigned in the Notice of Suspension.

ARGUMENT.

I.

The Doctrine of Practical Construction Is Not Open on This Appeal Because It Was Not Urged Below. And Even If Open Is Not Applicable to the Facts in Evidence.

Plaintiff contends that even if his conduct has the effect or tendency of bringing him into public scorn and contempt, the parties have placed a practical construction on the employment contract excluding his specific conduct before the Committee from the operation of paragraph 5, the so-called "public relations" or "morals" clause. (P. B. pp. 22-27.) The contention is unsound and unavailable, as may be readily shown.

First: The contention is not open to plaintiff on the present record, because it raises an issue not presented, considered or determined below. Neither by motion for judgment or directed verdict, nor request for a special verdict did plaintiff bring to the trial court's attention his present claim that the contract had been so interpreted by the parties. To the contrary, it is quite evident from the record as a whole that the cause was tried below on the theory that if plaintiff's conduct in fact had the effect or tendency claimed for it by defendant a violation of the contract was made out. In that condition of the record the new theory is not open on appeal, even to bring about an affirmance. (*Foster & Kleiser Co. v. Special Site Sign Co.* (C. C. A. 9), 85 F. 2d 742, 751; *Sacramento Sub. etc. Co. v. Melin* (C. C. A. 9), 36 F. 2d 907, 909; *World Fire etc. Ins. Co. v. Carolina Mills Dist. Co.* (C. C. A. 8) 169 F. 2d 826, 829; *Meloon v. Davis* (C. C. A. 1), 292 Fed. 82, 87; *Peck v. Heurich,* 167 U. S. 624, 629, 42 L. Ed. 302, 17 S. Ct. 927; *Ford Motor Co. v. Farrington* (C. C. A. 9), 245 Fed. 850, 852-853.)

Second: Assuming for the moment that the rule of practical construction would have been available if timely urged, it is clear that its application would have injected another question of fact into the case; for evidence of conduct claimed to constitute an interpretation by the parties is "not conclusive . . . and it may be disregarded in favor of more satisfactory evidence to the contrary . . ." (*Riverside Heights etc. Co. v. Riverside Trust Co.,* 148 Cal. 457, 467, 83 Pac. 1003, 1007; *Caletti v. Slate,* 45 Cal. App. 2d 302, 305, 114 P. 2d 9, 10.)

The rule which prevents consideration of new theories on appeal is applicable *a fortiori* when, as here, an issue of fact which should be passed on by the jury is involved in the new theory. (*Securities & Exchange Com. v. Chenery Corp.,* 318 U. S. 80, 88, 87 L. Ed. 626, 633, 63 S. Ct. 554; *Meloon v. Davis, supra,* 292 Fed. at 87.)[2]

Third: In California, evidence of so-called practical construction by the parties may be resorted to *only* when the contract is ambiguous. (*Jameson v. Chanselor etc. Oil Co.,* 176 Cal. 1, 8, 167 Pac. 369, 371-372; *Pierce v. Merrill,* 128 Cal. 464, 472, 61 Pac. 64, 66; *Truett v. Adams,* 66 Cal. 218, 222-223, 5 Pac. 96, 100; *Dabney v. Dabney,* 9 Cal. App. 2d 665, 670, 51 P. 2d 108, 110; *Hughes v. Pacific Wharf etc. Co.,* 188 Cal. 210, 217, 226,

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[2]The cases cited by plaintiff (P. B., p. 27) are not in point. In *Carlisle v. Sandeagle,* 295 U. S. 255, 66 L. Ed. 927, 42 S. Ct. 510, no new issue of fact was involved in the theory urged on appeal. In *Hornblower v. City,* 241 Fed. 450, the court merely declined to pass on the sufficiency of all the defenses urged below, because it found one of them—which had been raised in the trial court—sufficient to support the judgment. *Sun v. Vinton,* 248 Fed. 623, held only that a point which if good would have required an affirmance on a prior appeal, was waived by failing to urge it at that time, so that after a reversal, it was not open on the second appeal. If this decision has any relevancy here it is in support of our contention.

205 Pac. 105, 108, 111-112; *Hine v. State Life Ins. Co.*, 140 Cal. App. 657, 661, 35 P. 2d 1042, 1044; *Skousen v. Herz,* 135 Cal. App. 116, 121, 26 P. 2d 498, 500; *Purdy v. Buffums, Inc.,* 95 Cal. App. 299, 303, 272 Pac. 770, 771; *Briggs v. Marcus-Lesoine, Inc.,* 3 Cal. App. 2d 207, 212, 39 P. 2d 442, 444; *Coneland Water Co. v. Nickalls,* 75 Cal. App. 12, 219, 242 Pac. 518, 521; *Moreing v. Weber,* 3 Cal. App. 14, 21, 84 Pac. 220, 222-223.)

It has never been claimed in this case—in fact it is not even now argued—that the public relations clause of the contract is ambiguous. Nor could it well be so argued for its language is plain to the effect that the plaintiff "will not do *any* act or thing that will tend to . . . bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community . . . or prejudice the producer or the motion picture industry in general." [R. 12, italics ours.] To be sure, whether any given act by plaintiff has the prohibited tendency or effect, may present an arguable question of fact for a jury; but that does not render the *contract* uncertain. The latter clearly applies to *all* conduct which has the necessary tendency or effect. Assuming, as the form of plaintiff's contention requires, that his conduct did have this tendency or effect, the "practical construction" sought by him would eliminate it as a ground of default, thus flying into the teeth of the contractual requirement that *all* such conduct is banned.

Fourth: It is equally well settled in California that the acts of the parties relied on as a practical construction must appear with reasonable certainty to have been the acts of both parties and to have been done with knowledge and in view of the purpose later sought to be attributed to them (*Skousen v. Herz, supra,* 135 Cal. App. at 121, 26 P. 2d at 500; *Pastene & Co. v. Greco Canning Co*

(D. C. Cal.), 268 Fed. 168, 171); or, as some of the other decisions put it, the "acts must be direct, positive and deliberate and must show that the acts were done in an attempted compliance with the terms of the contract or agreement . . ." (*Barnhart Aircraft, Inc., v. Preston,* 212 Cal. 19, 24, 297 Pac. 20, 22; *Canavan v. College of Osteopathic P. & S.,* 73 Cal. App. 2d 511, 518, 166 P. 2d 878, 882.)

No such showing was made in the case at bar. The act relied on as a practical construction—*i. e.,* telling plaintiff that Mr. Mannix had told the Committee's investigators, in response to their inquiry whether Mannix knew that plaintiff and another writer were Communists, that he (Mannix) was not concerned with whether they were or not (O. B. p. 27)—certainly was not anything done in attempted compliance with the contract. Nor was it done with any knowledge or contemplation of the purpose now attempted to be ascribed to it, that is, as an interpretation of the contract. The contract was not even mentioned in the conversation.

Furthermore, the conversation took place months before plaintiff staged his defiant scene in Washington, D.C. There was not then, nor was there ever, any notice or intimation to the defendant that the plaintiff intended to defy the Congress or refuse to answer its pertinent questions directed to a burning and vital issue, then and now uppermost in the minds of Americans. Nor was there anything in the conversation that tended in the slightest to indicate that such or any conduct which violated the public relations clause would be condoned or overlooked by the defendant.

The evidence relating to the statements of Messrs. Johnston and McNutt (P. B. p. 24) is subject to these same comments. In addition, it should be noted that these gentle-

men were *not plaintiff's employer,* a fact which plaintiff himself emphasizes when it suits his purpose. (See, P. B. pp. 52, 55.) Their acts, therefore, were not the acts of one of the parties to the contract and so could not possibly be of any effect as a construction of it. (*Skousen v. Herz, supra,* 135 Cal. App. at 121, 26 P. 2d at 500; *Pastene & Co. v. Greco Canning Co., supra,* 268 Fed. at 171.)

Fifth: Plaintiff seems to intimate that the public relations clause applies only to acts involving moral turpitude. (P. B. pp. 24-25.) But nothing in the contract justifies such a limitation of its language; and nothing specific or tangible in that regard is pointed out by plaintiff. The question, under this clause, is not whether the employee's conduct is immoral or criminal, but whether it tends to bring him into public scorn or contempt, prejudice his employer or shock or offend the community. That tendency could inhere in conduct technically lawful in itself; and that it actually did inhere in plaintiff's conduct was a fact the defendant offered, but was not permitted, to prove. (O. B. pp. 106-109, 113-118.)

Sixth: The authorities cited in this connection by plaintiff are as irrelevant as his argument. *Carpenter v. Norcross,* 204 Fed. 537, and *Herbert v. Wood,* 113 Misc. 671, 185 N. Y. S. 325 (P. B. p. 24), held that where an employee was discharged for intoxication and there was evidence that he was drinking with customers at the instance and with the consent of his employer, it could not be said as a *matter of law* that his drunkenness was justification for his discharge; it was a question of fact for the jury.

Child v. Boyd, 175 Mass. 493, 56 N. E. 608 (P. B. p. 24), held only that immorality as such, *i. e.,* resort to house of prostitution, was not ground for discharge unless

it rendered the employee unfit for his work. It did not appear that the employee had agreed not to so conduct himself. In the case at bar the employee expressly agreed not to do any act or thing which would tend to bring him into public scorn, contempt and the like. Of course, an employee may by agreement make his continued employment depend on matters which in the absence of agreement would not be grounds for ending it.

II.

The Contract Confers the Right of Suspension. Even If It Does Not, Plaintiff Cannot Recover, and Defendant Is Entitled to Refuse Its Performance, So Long as Plaintiff Is in Default.

First: The argument which is offered in support of the contention that there is no right to suspend for a violation of the public relations clause (P. B. pp. 27-30) would be more appropriate if the question were the non-justiciable one of whether it would be wise for plaintiff to agree to a contract in which such a right was granted. The fact is, however, that he did agree and since there is no claim of fraud, mistake or any other infirmity in his execution of the contract, it is obviously of no legal significance that the bargain which he made was an unwise or even a hard one.

Plaintiff does not and cannot deny that a violation of the public relations clause would entitle the employer to terminate the contract. He cannot deny this, because paragraph 11 of the contract expressly provides [R. 17-18, italics and parenthetical lettering ours]:

> ". . . In the event of the failure, refusal or neglect of the employee to perform his required services *or observe any of his obligations hereunder* to the full limit of his ability or as instructed, the producer,

> *at its option,* shall have the right [a] *to cancel and terminate this employment,* [b] may refuse to pay the employee any compensation for and during the period of such failure, refusal or neglect on the part of the employee, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues . . ."

It will be noted at once that the right to suspend, *i. e.,* the right to refuse payment of compensation and to extend the term of the contract, is given for exactly the same defaults as would justify termination of the contract. The failure, refusal or neglect to observe *any* of the employee's obligations — and compliance with the public relations clause was one of his obligations—gives the employer, at his option, the right of termination *or* suspension. No differentiation between these two remedies, in respect of the causes which bring them into being, is made in the contract. It follows, therefore, that since a violation of the public relations clause would admittedly justify termination of the contract, it must also justify its suspension.

Plaintiff's counsel must realize the significance of the juxtaposition of these alternative remedies; for whenever they had occasion to quote or refer to paragraph 11 in their brief, they very carefully omitted the language which indicates that the right of suspension is coextensive with, and is brought into being by exactly the same defaults as, the right of termination. (See, *e. g.,* P. B. pp. 19, 27-28.) Their lack of candor in this regard speaks out eloquently against the argument they make.

Second: In point of fact, it is of no consequence whether the contract does or does not give a right of suspension for failure to observe the public relations clause.

Since such a failure would be a breach of contract, the defendant would have the right, as a matter of general contract law, to refuse to perform further. (O. B. pp. 68-69.) The so-called "suspension" is no more than a refusal on defendant's part to perform.

Third: It is also immaterial that the suspension was accompanied by conditions which were improper or impossible of performance. (P. B. pp. 34-36.) Assuming, without conceding, that to be so, the situation would be only that of a defendant who had required as a condition of continued employment compliance with directions not permissible under the agreement; in other words, had itself broken a contract which had been first breached by the plaintiff. The defendant's subsequent breach would not reinstate the plaintiff's right of recovery which he lost by his own default. (Cases cited, O. B. pp. 68-69.)

In short, if the conditions of the notice are eliminated entirely by a declaration of invalidity, the fact still remains that plaintiff cannot enforce the contract so long as he has not himself performed his obligations under it. It is still necessary, therefore, to decide whether the issues of performance were fairly submitted to the jury.

Fourth: Plaintiff's fear that the right of suspension gives the employer the power to keep him off the labor market forever (P. B. p. 30) is entirely illusory. (See, also, Point V, *Second, infra.*) In California, no personal service contract can "be enforced against the employee beyond seven years from the commencement of services under it . . ." (*Cal. Labor Code,* Sec. 2855.) And this is true even when the seven-year limit is exceeded because of extensions of the term by consent or by reason of the employee's default. (*De Haviland v. Warner Bros. Pictures,* 67 Cal. App. 2d 225, 234-237, 153 P. 2d 983, 987-989.)

III.

The California Political Activity Statute Is Not Applicable Because No Political Activity of Plaintiff Was Interfered With.

The argument based on the California political activity statute (*Cal. Labor Code,* Secs. 1101-1103) adds nothing to the case.

First: Assuming that the effect of the statute is to prevent an employer from discharging or suspending an employee for political activities or affiliation, no violation of the statute has been shown in the case at bar. The test of whether any given activities are within the proscription of the statute is "whether those activities are related or connected with the orderly conduct of government and the peaceful organization, regulation and administration of the government. . . ." (*Lockheed Aircraft Corp. v. Superior Court,* 28 Cal. 2d 481, 485, 171 P. 2d 21, 22.)

The activities which gave rise to the present dispute were certainly not of the kind included within the ambit of the statute. How can it reasonably be said that responding to a subpoena to testify before a Congressional Committee is a "political activity," particularly when the response consists of a criminal and contumacious refusal to answer pertinent questions? As said in the *Lockheed* case, political activities are those related to the *orderly* conduct of government. They cannot, under any proper definition, be said to include activities which are neither orderly nor lawful nor connected with the conduct of government.

The right to be a witness or as a witness to insist upon constitutional rights or immunities is not political. Such a right falls within the much broader definition of "civil rights" whereas "political activities" or "political rights"

are only those concerned with "the power to participate directly or indirectly in the establishment or management of government. The elective franchise and the right to hold public offices constitute the principal political rights of citizens of the several States." (*People v. Washington,* 36 Cal. 658, 662; *State v. Collins,* 69 Wash. 268, 124 Pac. 903, 904-905; *Winnett v. Adams,* 71 Neb. 817, 99 N. W. 681, 684; *Litzelman v. Town of Fox,* 285 Ill. App. 7, 1 N. E. 2d 915, 917; *Friendly v. Olcott,* 61 Ore. 580, 123 Pac. 53, 56; *Payne v. Emmerson,* 290 Ill. 490, 125 N. E. 329, 321; *Haupt v. Schmidt,* 70 Ind. App. 260, 122 N. E. 343, 344.)[3]

Second: So far as political affiliation is concerned, the Supreme Court of California has held expressly that Sections 1101-1103 of the *Labor Code* do not protect "any individual or group advocating the overthrow of the government by force and violence . . ." (*Lockheed Aircraft Corp. v. Superior Court, supra,* 28 Cal. 2d at 485, 171 P. 2d at 22.) If, therefore, the Communist Party is such a group, the non-Communist affidavit required of the plaintiff was not an illegal condition.

It will be recalled that the defendant sought, but on *plaintiff's* objection was not permitted, to prove that the Communist Party was just such an organization. (O. B. pp. 116-117.) Having prevented the defendant from proving facts which would have made the statute inapplicable, he obviously cannot now be permitted to invoke it for his benefit. Certainly, if he does invoke it he but demonstrates the serious and prejudicial error in the trial court's exclusion of that evidence.

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[3]If plaintiff's appearance before the Committee was political activity, how can he justify his contention that defendant was entitled to direct him as to the manner of his conduct there (P. B. pp. 52-3) or reconcile that contention with the argument which he bases on the political activity statute? (*Cf.,* note 33, O. B. p. 91.)

IV.

The Interference of Third Parties With Plaintiff's Contractual Relations Do Not Affect His Employer's Rights, Whatever May Be the Result as Against the Third Parties.

The fact that defendant's action in suspending plaintiff may have been induced by others is entirely immaterial, even if it be a fact, which it is not.[4] All that would result from such interference by third parties with plaintiff's contractual status would be a cause of action in plaintiff against the third parties responsible. And that is as far as the cases cited by plaintiff go. (P. B. pp. 33-34.)

As between *the parties to the contract,* the question is not why the employer acted as he did, but whether he had the right so to act. If an employer has the right to discharge or suspend, the fact that he was induced to exercise it by another is material only in an action between the employee and that other. The employer's motive or reason for availing himself of his legal right is of no concern to the law. If he has the right he may resort to it in bad faith or out of ill will or for any other motive; if he has no such right, neither the highest of good faith nor the most exemplary of motives will save him. In either event his motive is immaterial. (*May v. New York M. Pic. Corp.,* 45 Cal. App. 396, 404, 187 Pac. 785, 788; *Development Co. v. King* (C. C. A. 2), 161 Fed. 91, 93; *Comerford v. International Harvester Co.,* 235 Ala. 376, 178 So. 894, 895-896; 39 C. J. 89, Sec. 90; 56 C. J. S. 435.

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[4]The declaration of policy, which is the basis upon which plaintiff's argument is postulated, was entered into voluntarily by the defendant and its acts out of which this suit arose were dictated by its executives. (O. B. pp. 21-23.) There is no evidence to the contrary and none is cited by plaintiff.

Sec. 44; 35 Am. Jur. 471, Sec. 37.)[5] The fact that he is prompted to act by the suggestion or even persuasion of others does not transform into a breach of contract that which, in the absence of the prompting, would not violate the agreement.

V.

The Conditions of the Notice of Suspension Were Not Improper or Void.

First: The contention that the contract is void because it restrains plaintiff from engaging in a lawful profession (P. B. pp. 34-35) is a strange one to emanate from a party who is seeking to *enforce the contract.* If the contract is void for this reason (and we are not to be understood as conceding in any way that it is), it is entirely void. There is nothing to show that the agreement would have been made by the defendant without the right to suspend for failure, refusal or neglect of the employee to observe his obligations. Nor is there anything to indicate how much of the total consideration agreed to be paid by defendant was apportioned to plaintiff's grant of the right of suspension. In the absence of such a showing, the void provision cannot be severed and the whole contract falls. (*Morey v. Paladini,* 187 Cal. 727, 738, 203 Pac. 760, 764; *Getz Bros. & Co. v. Federal Salt Co.,* 147 Cal. 115, 118, 81 Pac. 416, 417; *More v. Bonnet,* 40 Cal. 251, 254-255.)

Actually, however, the contract is not void. It does not restrain plaintiff from carrying on a lawful trade or pro-

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[5]See, also, the following cases, establishing the rule in California that the doing of an otherwise lawful act is not made wrongful because of the motive with which it is done. (*Automobile Ass'n v. Automobile O. Ass'n,* 216 Cal. 125, 142, 13 P. 2d 707, 714-15; *Union Labor Hosp. v. Vance Lbr. Co.,* 158 Cal. 551, 554, 112 Pac. 886, 887-88; *Fisher v. Feige,* 137 Cal. 39, 41-42, 69 Pac. 618.

fession. On the contrary, it affords him the opportunity to carry one on—and at the very handsome remuneration of $1350 per week. No one has heretofore supposed that an employee who agrees for a limited term to work exclusively for one employer has thereby entered into an illegal contract in restraint of trade; and no case so holding is cited by plaintiff. The cases which are cited all involved contracts which wholly prevented the exercise of a trade or profession even though the party restrained faithfully performed his part of the agreement. That is an entirely different situation from an employer-employee relationship, in which the party allegedly restrained not only may, but is required, to engage in a trade or profession so long as he observes his own obligations upon which the continuance of the employment is conditioned.

Second: The fact that in the event of the employee's failure, refusal or neglect to perform his obligations the employer may refuse to pay the agreed compensation adds nothing to the contract which would not be a part of it by force of the general law of contracts. (O. B. pp. 68-69.) Such an agreement is, in effect, nothing more than a recognition of the common law doctrine of failure of consideration. (*Richter v. Union Land etc. Co.,* 129 Cal. 367, 372, 62 Pac. 39, 40; *Mulborn v. Montezuma Imp. Co.,* 69 Cal. App. 621, 628-629, 232 Pac. 162, 165; *Restatement,* Contracts, Sec. 274; 3 Williston on Contracts (Rev. Ed.), 2289, 2324, 2443, Secs. 813, 831, 869.)

Upon defendant's refusal to perform plaintiff had the right to treat the contract as at an end, even though the defendant's refusal was justified; a right which he had *a fortiori* if, as he contends, the refusal was not justified. [Cases cited, O. B. pp. 68-9; *Restatement,* Contracts, sec. 399(1).] Had he made that election he would have been free to work elsewhere. He did not so choose, but instead,

sought to keep the contract in force, insisting that plaintiff's refusal to perform was without justification. If he should ultimately prevail in this contention, he will receive the agreed consideration for his services. If he should be defeated, however, his inability to work elsewhere while going uncompensated by defendant, results, not from any contractual restraint, but from his own election not to avail himself of his legal right to be free of the agreement. He was not restrained by the contract, but by his own voluntary choice of remedies.

Third: Nor is the contract rendered unlawful by the provision that its term may be extended for a period equal to that during which the employee was in default; particularly when it is kept in mind that the aggregate period of service cannot be extended beyond seven years in any event. (Point II, *Fourth, supra.*) Entirely apart from any question of default, it would never be contended that parties could not validly contract for a term of exclusive employment of, say, two years, extendable at the employer's option to three, four, five, six or seven years.[6] The right of extension to which plaintiff now objects is even more limited, for it is exercisable only in the event, and for the period of, plaintiff's default. He had the power to defeat the right entirely by observing his obligations.

Fourth: The propriety of the non-Communist affidavit and the inapplicability of the political activity statute (P. B. pp. 35-6) have already been shown. (Points II, *Third;* III, *supra.*)

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[6]In fact, that is exactly the contract that plaintiff made [R. 24-25]; and plaintiff was not heard to complain of any invalidity when defendant exercised its first option so to extend.

VI.

The Defendant Did Not Waive Plaintiff's Default by Insisting That He Had Violated the Contract and That as a Result Defendant Need Not Perform.

Plaintiff's criticism of our contractual theory (P. B. p. 37) has already been answered in the main. (Points II and IV, *Second, supra.*) We add a word on the assertion that by seeking to suspend, *i. e.,* by refusing to perform, because of plaintiff's default the defendant in some way waived that default. The defendant has at all times insisted that plaintiff was in default; and that because of that default the defendant would not perform its part of the contract. How can that possibly be held to be a waiver?

The most that can be said on plaintiff's side is that the defendant invoked a broader remedy than was open to it. But the erroneous resort to a non-available remedy does not deprive the injured part of his right subsequently to have a proper remedy. (*Kulawitz v. Pac. etc. Paper Co.,* 25 Cal. 2d 664, 672, 155 P. 2d 24, 28-9; *Agar v. Winslow,* 123 Cal. 587, 590-2, 56 Pac. 422, 423; *Atchison etc. Ry. Co. v. Superior Court,* 12 Cal. 2d 549, 555, 86 P. 2d 85, 88; *Herdan v. Hanson,* 182 Cal. 538, 541-2, 189 Pac. 440, 442; *McGibbon v. Schmidt,* 172 Cal. 70, 75, 155 Pac. 460, 463.) Especially is this so when, as here, the contract expressly provides, that "the several rights, remedies and options of the [defendant] . . . shall be construed as cumulative and no one of them exclusive of the other or of any right or remedy allowed by law . . ." [R. 19.]

VII.

The Charge to the Jury Was Prejudicially Erroneous. Plaintiff Has Not Shown the Absence of Error or Prejudice.

For the most part, plaintiff's argument in respect of the errors in the charge to the jury has been anticipated and squarely met in our opening brief. For that reason and because of the limits imposed upon the length of this brief our reply will be somewhat summary.

A. The Instructions Relative to the Law of Libel and the Status of the Communist Party in California Constituted Prejudicial Error.

First: Plaintiff asserts baldly that the charge on libel was pertinent; but no issue of fact or law which would make it so is pointed out. (P. B. pp. 39-42.) Nor is there even an attempt to reply to the specific indications of prejudice to which we referred. (O. B. pp. 70-74.) Furthermore, there is no adequate answer to the decisions cited by us holding that abstract and irrelevant instructions are necessarily confusing and improper; and that erroneous instructions which affect substantial rights of the appellant, are prejudicial unless it *affirmatively* appears that they were harmless. (O. B. p. 73.)

Second: The charge on Communism is sought to be defended as having been necessary to eliminate that question from the case. (P. B. pp. 42-4.) But that was not what the jury were told. They were informed that they were to bear in mind the stated principles relating to the Communist Party "in judging whether the conduct of the plaintiff was as charged by the defendant . . ." [R.

915-916.] That being so, the legal status of the Party should have been correctly defined, not erroneously and incompletely as was in fact the case. (O. B. pp. 74-77.)

B. The Pre-Trial Order Precluded the Trial Court From Charging the Jury Relative to Waiver.

Plaintiff argues that because the pre-trial order contained a stipulation that plaintiff had duly performed all "writing" services until about December 2, 1947, and defendant until that date had met all its obligations under the employment contract, the instructions of the court and the interrogatory relative to waiver were proper. In effect plaintiff contends that this stipulation created or reserved the issue of waiver. It is so obvious that the elements essential to such an issue are not incorporated in the stipulation that we do not extend our argument beyond reference to Opening Brief pages 78-84 and 88-92. Since the issue was not presented by either the pre-trial order or the pleadings, there was no such issue.

Furthermore, if waiver so plainly appeared as a possible issue from the stipulated facts, why was it not included in the specification of issues remaining to be determined? Obviously, because it was an afterthought.

Contrary to plaintiff's assertion (P. B. p. 45) we do *not* concede that the evidence on the issue of waiver was without conflict. Those portions of the evidence *to which the trial court directed the jury's attention and with respect to which it framed the charge* were not contradicted. But there was other evidence, to which the jury's attention was *not* called and on the legal effect of which the charge was silent, which would have furnished adequate support for a finding of non-waiver. (O. B. pp. 80-83.)

C. **The Instruction Dealing With Declarations Prior to the Hearing of Defendant's Attitude Towards Plaintiff's Political Beliefs Was Not Directed to the Question of Whether Plaintiff Had Breached His Contract and Had It Been So Directed Would Still Have Been Prejudicial.**

D. **The Charge Gave Undue Prominence to the Evidence of Plaintiff on Waiver, at the Same Time Minimizing and Omitting to Mention Defendant's Opposing Theory and Evidence.**

The foregoing statements are supported in Opening Brief at pages 85-93 and 93-94 respectively by matter directly responsive to the contrary arguments presented in Plaintiff's Brief pages 45-55.

E. **On the Subject of Plaintiff's Conduct the Instructions Were Contradictory and Inconsistent With Each Other in Respect of Plaintiff's Obligations Under Paragraph 5 of the Employment Contract.**

Plaintiff argues that (1) because, in response to defendant's objection that various instructions failed to state that defendant need show only that plaintiff's conduct *tended* to produce certain reactions, the court corrected *some* of the instructions, the error was fully cured and (2) because, after the court had so acted, the defendant did not repeat its objections to the uncorrected instructions, the objection was waived. (P. B. 56-58.)

As to plaintiff's proposition (1), we refer to Opening Brief pages 101-104 as a complete justification of defendant's contention that the error was not cured.

As to plaintiff's proposition (2) we direct attention to the fact that after the partial corrections the court asked

for "any additional exceptions which are not already in the record." Defendant had stated his objections *"in the record,"* had no *"additional"* objections and had a right to assume that the court had made all the changes which the court would make in response to the objections.

The failure to request an instruction on waiver did not preclude the right to object to an erroneous instruction actually given on that subject at the request of the other party or on the court's own motion. (*St. Paul F. & M. Ins. Co. v. Bachmann,* 285 U. S. 112, 118-19, 76 L. Ed. 648, 653-4, 52 S. Ct. 270.) Such a failure would only preclude the right to object to an entire absence of any instruction on the issue.

F. The Instructions Did Not Recognize the Right of an Employer to Justify on Any Ground Existing at the Time of His Action, Whether or Not Then Specified.

Plaintiff's argument to the contrary (P. B. pp. 59-61) is fully met in Opening Brief pages 104-105, where it is also pointed out that the right to terminate the contract *or* plaintiff's compensation accrues in the event of "the failure, refusal or neglect of the employee to perform his required services *or observe any of his obligations.*"

G. **The Charge on the Rights of Witnesses Was Error for the Reasons Set Out in O. B. pp. 95-100 Where the Answer Will Be Found to Plaintiff's Contrary Argument (pp. 61-63).**

H. **Since Courts Will Take Judicial Notice That a Large Part of the American Public Looks With Scorn and Contempt on Persons It Believes to Be Communists, the Jury Should Have Been So Instructed.** (O. B. pp. 106-109.)

Stripped of a good deal of language plaintiff's reply to the foregoing is an insistence that the single statement in the instructions that "In California it is libelous to call a person a Communist" (which statement was in the midst of various other instructions concerning the law of libel), was a sufficient compliance with defendant's request for an instruction in line with the contention stated in the heading. (P. B. pp. 64-65.) Defendant's answer to this will be found as indicated in the heading and at Opening Brief pages 70-77 defendant presents its broader contentions that the instructions under the designation "The Question of Communism" constituted prejudicial error.

The "objections" appearing at Opening Brief pages 108-9 which plaintiff says were waived (P. B. p. 65) are in fact merely arguments or reasons why the charge on the law of libel was not the equivalent of our requested instruction on judicial notice which the trial court refused to give. In so far as these reasons were also the basis of an objection to the charge on libel, they were adequately raised in the trial court. (O. B. p. 64, *Cal-Bay Corp. v. U. S.* (C. C. A. 9), 169 F. 2d 15, 18-19, *cert den.* 335 U. S. 859; *Hindman v. First Nat. Bank* (C. C. A. 6), 112 Fed. 931, 934, *cert. den.* 186 U. S. 483; *Swiderski v. Moodenbaugh* (C. C. A. 9), 143 F. 2d 212, 213.)

VIII.

The Trial Court Erred to the Prejudice of Defendant in Its Rulings on the Admission and Exclusion of Evidence. (O. B. pp. 110-121.)

It is believed that the matter in plaintiff's brief (pp. 66-81) relative to defendant's above-stated contention has been adequately dealt with in that portion of the Opening Brief above indicated.

The claim that the editorials were not offered in evidence (P. B. p. 73) cannot withstand a reading of the proceedings cited in the specification of error. [O. B. pp. 41-2. See also, R. 825; and Typewritten Transcript, p. 1021, lines 2-11.] The trial court indicated emphatically that no testimony along that line would be received, not because of any defect in the offer, but because of the supposed immateriality of the evidence. In such circumstances no formal offer of proof is necessary. (*McCandless v. U. S.,* 298 U. S. 342, 347-8, 80 L. Ed. 1205, 1208-9, 56 S. Ct. 764; *Lawless v. Calaway,* 24 Cal. 2d 81, 91, 147 P. 2d 604, 609; *Tomaier v. Tomaier,* 23 Cal. 2d 754, 760, 146 P. 2d 905, 908; *Caminetti v. Pac. Mut. L. Ins. Co.,* 23 Cal. 2d 94, 100, 142 P. 2d 741, 744; *Heimann v. City,* 30 Cal. 2d 746, 757, 185 P. 2d 597, 604.)

IX.

The Cause Should Have Been Transferred to Another Judge Because of the Trial Judge's Personal Bias and Prejudice. (O. B. pp. 122-126.)

It is believed that the matter in plaintiff's brief (pp. 82-85) relative to defendant's above-stated contention has been adequately dealt with in that portion of the Opening Brief above indicated. It may be added that the preconceived opinion of the trial judge to which objection has been taken was not merely an impersonal opinion of abstract law; it was a complete conclusion on, and a pre-judgment of, the merits, *factual as well as legal,* of the defendant's case.

Respectfully submitted,

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